In the Supreme Court of the United States,

OCTOBER TERM, 1922.

REGAL DRUG CORPORATION, PETITIONER,
v.
JUSTUS S. WARDELL, AS UNITED STATES Collector of Internal Revenue for the First District of California. } No. 108.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RESPONDENT.

STATEMENT.

The petitioner maintains a drug store in San Francisco. From October 28, 1919, to some time in June, 1920, it held a permit authorizing it to sell intoxicating liquors and distilled spirits for non-beverage purposes. During that time (about 7½ months) it withdrew from bonded warehouses about 12,900 gallons of distilled spirits, about 450 gallons of sweet wines, and about 20 gallons of dry wines, for sale in a "drug store" in which the stock of drugs, medicines, and sundries, other than intoxicating liquors, was worth only about $15,000. (R. 8.)

If the distilled spirits were sold in pint bottles, those pint bottles went over its counter at the rate

of about forty bottles an hour, sixteen hours a day, every day throughout the entire seven and a half months.

Its permit to sell intoxicating liquors and distilled spirits for nonbeverage purposes was revoked on June 18, 1920, on the ground that it had disposed of large quantities of intoxicating liquors for beverage purposes in violation of the national prohibition act and of the conditions of the permit. There was an allegation in the bill that the hearing was inadequate, and, on the other hand, an affidavit, set forth in the record (R. 11), that the revocation occurred after a full hearing at which the petitioner was represented by counsel. But the extent of that hearing was not attacked in a direct proceeding, and it is not here material.

After the distilled spirits and wines had been sold and disposed of and after the permit had been revoked, the Commissioner of Internal Revenue, in or about June, 1920, levied against the petitioner on those distilled spirits the tax which was fixed under the old law and retained under section 35 of the national prohibition act (see p. 5, infra), for such spirits when withdrawn for beverage purposes, and also levied taxes on the sweet and dry wines. The commissioner then attempted to collect from the petitioner the difference between $115,249.50, the total tax assessed upon those distilled spirits and wines, and $39,656.89, the amount which had been already paid by the petitioner, which difference

amounts to $75,592.61. *The sums thus assessed were taxes imposed under the revenue act of 1918* (secs. 600a and 611, 40 Stat. 1057, 1105, 1110) *and were not double taxes or penalties.*

The Commissioner assessed a tax of $75 on the petitioner for conducting the business of a rectifier for three-fourths of a year (under Rev. Stat., sec. 3244, as amended by the act of Mar. 1, 1879, sec. 4, 20 Stat. 327, 333) plus 25 per cent for failure to make a return (under Rev. Stat., sec. 3176, as amended by the act of Feb. 24, 1919, 40 Stat. 1057, 1148), amounting altogether to $93.75.

The Commissioner also levied against, and attempted to collect from, the petitioner, the sum of $500 for retailing distilled spirits and intoxicating liquors in violation of the national prohibition act, and the sum of $1,000 for having manufactured distilled spirits and intoxicating liquors in violation of the national prohibition act.

The petitioner then brought suit to enjoin the respondent, as Collector of Internal Revenue, from enforcing the collection of the taxes and penalties by distraint proceedings. It alleged that the levy of taxes, assessments, and penalties was illegal, and, although it had sold nearly 18,000 gallons of distilled spirits and about 470 gallons of wines within less than eight months, it alleged that it had no funds with which to pay the money demanded.

On motion, the District Court dismissed the petitioner's amended complaint on the ground that

the action was barred by Revised Statutes, section 3224, and that the petitioner had a complete and adequate remedy at law.

On appeal to the Circuit Court of Appeals, the decree of the court below was affirmed.

On October 10, 1921, this court granted a writ of certiorari to the petitioner.

QUESTION INVOLVED.

The Government concedes that under the decision in *Lipke* v. *Lederer* (June 5, 1921) *penalties and double taxes* could not be collected in the manner here attempted.

But it contends that under tax laws which antedated the national prohibition act and which were expressly retained under that act, the Commissioner of Internal Revenue properly levied taxes (not double taxes) on the distilled spirits and wines used for beverage purposes, and the Collector of Internal Revenue properly sought to collect such taxes by distraint proceedings.

CONTENTION OF THE PETITIONER.

The whole contention of the petitioner was well summed up by the Circuit Court of Appeals when it said (R. 39):

> The appellant contends that as the 18th Amendment and the statute passed for its enforcement prohibits absolutely the manufacture and sale of intoxicating liquors and wines for beverage purposes, the provisions of

the prior law inconsistent with the constitutional enactment and the enforcing statute have been repealed and there can be no tax assessed or imposed on such liquors and wines. In other words, there can be no legal tax, so it is contended, upon that which can not be legally manufactured or sold, and that if manufactured or sold illegally the liability of the offender is for a penalty and not for a tax, and if it is for a penalty its collection must be enforced by proceedings in court and not by the summary proceedings of an assessment.

SECTION 35 OF THE NATIONAL PROHIBITION ACT RETAINS PREEXISTING TAXES.

Section 35 of the national prohibition act provides:

> All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency and THE REGULATIONS HEREIN PROVIDED FOR THE MANUFACTURE OR TRAFFIC IN INTOXICATING LIQUOR SHALL BE CONSTRUED AS IN ADDITION TO EXISTING LAWS. THIS ACT SHALL NOT RELIEVE ANYONE FROM PAYING ANY TAXES OR OTHER CHARGES IMPOSED UPON THE MANUFACTURE OR TRAFFIC IN SUCH LIQUOR. * * *

There is nothing in *Lipke* v. *Lederer* which militates against this portion of section 35 or which shows that preexisting taxes may not be collected in the manner in which such taxes had been collectible.

UNDER THAT PORTION OF SECTION 35 TAXES MAY STILL BE IMPOSED AND PREEXISTING STATUTES RELATING TO THE COLLECTION OF TAXES ARE STILL APPLICABLE.

In *United States* v. *Yuginovich*, 256 U. S. 450, this court said (p. 462):

> THAT CONGRESS MAY, UNDER THE BROAD AUTHORITY OF THE TAXING POWER, TAX INTOXICATING LIQUORS NOTWITHSTANDING THEIR PRODUCTION IS PROHIBITED AND PUNISHED, WE HAVE NO QUESTION.

And again (p. 464):

> * * * CONGRESS MANIFESTED AN INTENTION TO TAX LIQUORS ILLEGALLY AS WELL AS THOSE LEGALLY PRODUCED, WHICH WAS WITHIN ITS CONSTITUTIONAL POWER. * * *

In the *License Tax Cases*, 5 Wall. 462, this court expressly decided that Congress might tax businesses which were prohibited by valid State laws.

In *Youngblood* v. *Sexton*, 32 Mich. 406, the Supreme Court of Michigan, speaking by Justice Cooley, said (p. 426):

> If one puts the Government to special inconvenience and cost by keeping up a prohibited traffic or maintaining a nuisance, the fact is a reason for discriminating in taxation against him; and if the tax is imposed on the thing which is prohibited, or which constitutes the nuisance, the tax law, instead of being inconsistent with the law declaring the illegality, is in entire harmony with its general purpose and may sometimes be even more effectual.

CONCLUSION.

As we have already conceded, under *Lipke* v. *Lederer*, a bill in equity lies to restrain the collection of penalties in the manner here attempted by the collector. But the taxes, which were not double taxes, were properly imposed, and their collection by distraint proceedings can not be enjoined.

We therefore respectfully submit that the decision of the Circuit Court of Appeals should be affirmed in so far as it upholds the District Court in refusing to enjoin the collection, by distraint proceedings, of the taxes assessed; that such decision should be reversed in so far as it upholds the action of the District Court in refusing to restrain the collection, by such method, of the penalties imposed; and that the case should be remanded to the District Court with instructions to enter an appropriate decree.

JAMES M. BECK,
Solicitor General.

ROBERT P. REEDER,
Special Assistant to the Attorney General.

NOVEMBER, 1922.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

REGAL DRUG CORPORATION, PETITIONER,
v.
JUSTUS S. WARDELL, AS UNITED STATES Collector of Internal Revenue for the First District of California. } No. 396.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

STATEMENT OF THE CASE.

This is a suit to enjoin the respondent, as Collector of Internal Revenue for the First District of California, from enforcing, by distraint proceedings, the collection of certain taxes and penalties assessed against the petitioner.

Briefly summarizing the material allegations of petitioner's amended complaint, it is asserted that petitioner is a California corporation, engaged in the business of druggist in San Francisco; that on October 28, 1919, and from that time up to sometime in the month of June, 1920, petitioner held a duly issued permit authorizing it to sell intoxicating liquor and distilled spirits for nonbeverage purposes; that during such time petitioner withdrew from bonded warehouses some 17,900 gallons of distilled

spirits; that petitioner also during such time withdrew from such bonded warehouses a small quantity of sweet wines containing not over 21 per cent of alcohol and a small quantity of dry wines containing not over 14 per cent of alcohol; that at the time such distilled spirits and wines were withdrawn from bond there was collected from petitioner by the internal revenue authorities the sum of $39,656.89, which covered all taxes and assessments that could be properly levied thereon; that during the time said permit was in full force and effect petitioner disposed of all of said distilled spirits and wines in accordance with said permit and under and in accordance with the terms of the National Prohibition Act (41 Stat. 305.)

It should be here said, however, that petitioner's permit to sell intoxicating liquors and distilled spirits for nonbeverage purposes was revoked on June 18, 1920, by the Federal Prohibition Director for California, after a full hearing at which petitioner was duly represented by counsel, on the ground that petitioner had disposed of large quantities of intoxicating liquors in violation of the National Prohibition Act and of the conditions of said permit. (See Affidavit, Edw. A. Kenny, Chief Inspector, Office of Federal Prohibition Director for California; Rec. pp. 19–21.)

Reverting to the allegations of petitioner's amended complaint, it is further asserted that after said distilled spirits and wines had been sold and disposed of and after said permit had been revoked, as aforesaid,

the Commissioner of Internal Revenue (in or about June, 1920) arbitrarily levied against petitioner on said distilled spirits a so-called tax or assessment at the rate of $6.40 per gallon, the tax fixed for distilled spirits withdrawn for beverage purposes, amounting in the aggregate to $115,092.50 (sec. 600a, Revenue Act of 1918, approved Feb. 24, 1919; 40 Stat. 1057, 1105); that said Commissioner also arbitrarily levied a so-called tax or assessment at the rate of $0.40 per gallon on the sweet wines withdrawn, amounting to $153.80, and a tax at the rate of $0.16 per gallon on the dry wines, amounting to $3.20 (sec. 611, Revenue Act of 1918; 40 Stat. 1057, 1110); that the Commissioner is now attempting to collect from petitioner the difference between $115,249.50, the total tax assessed upon said distilled spirits and wines, and $39,656.89, the amount already paid by petitioner, which difference amounts to $75,592.61; that the Commissioner has also levied against, and is attempting to collect from, petitioner the following penalties: $93.75 for having conducted the business of a rectifier (sec. 3244, Rev. Stat.); $500 for retailing and selling distilled spirits and intoxicating liquors in violation of law (sec. 35, Title II, National Prohibition Act; 41 Stat. 305, 317, 318); and $1,000 for having manufactured distilled spirits and intoxicating liquors unlawfully (sec. 35, Title II, National Prohibition Act).

On motion, the District Court dismissed petitioner's amended complaint on the ground that the action was barred by section 3224, Revised Statutes, which pro-

hibits suits to restrain the assessment or collection of taxes, and that petitioner had a complete and adequate remedy at law by paying the tax under protest, appealing to the Commissioner of Internal Revenue for its refund, and, in the event of adverse decision by said Commissioner, suing for its recovery. (Secs. 3220, 3226, and 3227, Revised Statutes.)

The case was then taken on appeal to the Circuit Court of Appeals, which court affirmed the decree below.

Petitioner now seeks a further review by certiorari from this Court for the reasons hereinafter set forth.

PETITIONER'S ARGUMENT.

The Circuit Court of Appeals, after noting that the tax sought to be enjoined herein was levied after the effective date of the Eighteenth Amendment and the National Prohibition Act (Jan. 16, 1920) and that petitioner states—

> All of the facts involved here took place after the National Prohibition Act was enacted, which was on October 28, 1919. At that time and since, complete prohibition of the sale of intoxicating liquor for beverage purposes has been in effect.[1]

[1] Petitioner's assertion, although correct in fact, is somewhat misleading. It is true, as petitioner states, that on Oct. 28, 1919, "and since, complete prohibition of the sale of intoxicating liquor for beverage purposes has been in effect," but this was the result of the War Time Prohibition Act of Nov. 21, 1918 (40 Stat. 1045, 1046), and not of the National Prohibition Act, which, as stated above, did not become effective until Jan. 16, 1920 (*Dillon* v. *Gloss, Collector*, decided by this Court on May 16, 1921.) As, however, the War Time Prohibition Act continued in force at least until the National Prohibition Act went into effect and as both acts contained a similar prohibition concerning the sale of intoxicating liquors for beverage purposes, petitioner's implication that the result stated was accomplished by the National Prohibition Act becomes immaterial.

then summarizes petitioner's argument in the following words:

> The appellant (petitioner) contends that as the 18th amendment and the statute passed for its enforcement prohibits absolutely the manufacture and sale of intoxicating liquors and wines for beverage purposes (sec. 3, Title II, National Prohibition Act; 41 Stat. 308), the provisions of the prior law inconsistent with the constitutional enactment and the enforcing statute have been repealed and there can be no tax assessed or imposed on such liquors and wines. In other words, there can be no legal tax, so it is contended, upon that which can not be legally manufactured or sold and that if manufactured or sold illegally, the liability of the offender is for a penalty and not for a tax and if it is for a penalty its collection must be enforced by proceedings in court and not by the summary proceedings of an assessment. (Inserts ours.)

Analyzing this argument, which is identical with that made in this Court, it is seen that petitioner contends, in effect, that the injunction sought should issue for two reasons:

(1) That the tax is illegal;

(2) That at all events the liability of petitioner is, under the circumstances, for a penalty and not for a tax, and that therefore equity will grant relief.

ARGUMENT.

I.

The asserted illegality of the tax will not prevent the application of section 3224, Revised Statutes.

Section 3224, Revised Statutes, expressly provides:

> No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

The claimed illegality of the tax has never been held by this Court to remove the bar of the statute.

In the leading case of *Snyder* v. *Marks*, 109 U. S. 189, which was a suit to enjoin the collection of a revenue tax on tobacco, it was contended that the tax had been illegally assessed. This Court nevertheless held the action barred by section 3224. The Court, after reciting the history of the section and noting that the word "tax" as used therein comprehends an *illegal*, as well as a legal, tax, said (pp. 193–194):

> The inhibition of sec. 3224 applies to all assessments of taxes, made under color of their offices, by internal revenue officers charged with general jurisdiction of the subject of assessing taxes against tobacco manufacturers. The remedy of a suit to recover back the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. The remedy so given is exclusive, and no other remedy can be substituted for it. Such has been the current of decisions in the circuit courts of the United States, and we are satisfied it is a correct view of the law. *How-*

land v. *Soule*, Deady, 413; *Pullan* v. *Kinsinger*, 2 Abbott U. S. 94; *Robbins* v. *Freeland*, 14 Int. Rev. Rec. 28; *Delaware R. R. Co.* v. *Prettyman*, 17 id. 99; *United States* v. *Black*, 11 Blatchford, 538, 543; *Kissinger* v. *Bean*, 7 Bissell, 60; *United States* v. *Pacific Railroad*, 4 Dillon, 66, 69; *Alkan* v. *Bean*, 23 Int. Rev. Rec. 351; *Kensett* v. *Stivers*, 18 Blatchford, 397. In *Cheatham* v. *United States*, 92 U. S. 85, 88, and again in *State Railroad Tax Cases*, 92 U. S. 575, 613, it was said by this court, that the system prescribed by the United States in regard to both customs duties and internal revenue taxes, of stringent measures, not judicial, to collect them, with appeals to specified tribunals, and suits to recover back moneys illegally exacted was a system of corrective justice intended to be complete, and enacted under the right belonging to the Government to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its revenues. In the exercise of that right, it declares, by sec. 3224, that its officers shall not be enjoined from collecting a tax claimed to have been *unjustly assessed*, when those officers in the course of general jurisdiction over the subject matter in question have made the assignment (assessment) and claim that it is valid. (Italics for emphasis and insert ours.)

In *Dodge* v. *Osborn*, 240 U. S. 118, the appellant sued to enjoin the collection of certain taxes imposed under the income tax section of the Tariff Act of October 3, 1913, c. 16, sec. II, 38 Stat. 166, 181, on the ground that the taxing statute was repugnant to the Constitution of the United States and that the

taxes were therefore illegal. This Court, affirming the decree below dismissing appellant's bill, held section 3224 applicable. After quoting with approval the language above set forth from *Snyder* v. *Marks*, *supra*, the Court said (p. 121):

> And this doctrine has been repeatedly applied until it is no longer open to question that suit may not be brought to enjoin the assessment or collection of a tax because of the alleged unconstitutionality of the statute imposing it. *Shelton* v. *Platt*, 139 U. S. 591; *Pittsburgh &c. Ry.* v. *Board of Public Works*, 172 U. S. 32; *Pacific Whaling Co.* v. *United States*, 187 U. S. 447, 451, 452.

The statute here invoked has been said by this Court in *State Railroad Tax Cases*, 92 U. S. 575, 613, to have grown out of the "sense of Congress of the evils to be feared if courts of justice could, *in any case*, interfere with the process of collecting the taxes on which the Government depends for its continued existence."

II.

Conceding, for the sake of argument, that the tax in controversy is in the nature of a penalty, and assuming, although not admitting, that section 3224, Revised Statutes, does not apply to penalties, this suit would nevertheless be barred because petitioner has a plain, adequate, and complete remedy at law.

Assuming that the tax is in the nature of a penalty and that section 3224, Revised Statutes, is not applicable to penalties, it does not follow, as the Circuit Court of Appeals has plainly pointed out, that its collection can be restrained by a suit in

equity if there is a complete and adequate remedy at law. "That there is such a remedy," the court states, "can not be seriously controverted."

Section 3220, Revised Statutes, provides—

> The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all *penalties* collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; * * *

Section 3226 provides—

> No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any *penalty* claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had therein: *Provided*, That if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought without first having a decision of the Commissioner at any time within the period limited in the next section.

The next section, 3227, limits the time within which suit to recover taxes or penalties can be brought to two years after accrual of the cause of action.

This scheme of payment, appeal to the Commissioner for refund, and suit for recovery has been held by this Court to meet all requirements of due process and to constitute a "complete and exclusive system of corrective justice" in regard to moneys claimed to have been illegally exacted by the internal revenue branch of the Government. (*Dodge* v. *Osborn*, 240 U. S. 118, 120, 121, 122; *Nichols* v. *United States*, 7 Wall. 122, 130, 131; *Cheatham* v. *United States*, 92 U. S. 85, 88, 89; *State Railroad Tax Cases*, 92 U. S. 575, 613, 614; *Snyder* v. *Marks*, 109 U. S. 189, 193, 194.) "There is no place in this system for an application to a court of justice until after the money is paid." (*State Railroad Tax Cases*, supra.)

Petitioner's action must therefore be barred in the presence of the complete and exclusive remedy provided by Congress. (See *Dow* v. *City of Chicago*, 11 Wall. 108, 112.)

III.

In view of the fact that petitioner's right to bring the present suit has been foreclosed by the repeated decisions of this Court and by congressional enactment, it is submitted that this case presents no such question of gravity or general public importance as would warrant the issuance of the writ of certiorari. (*Fields* v. *United States*, 205 U. S. 292, 296.)

The petition should accordingly be denied.

JAMES M. BECK,
Solicitor General.

W. MARVIN SMITH,
Assistant Attorney.

SEPTEMBER, 1921.

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